

***TU, HB 831 and Thompson River Lumber Co.***  
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*Department of Natural Resources and Conservation*  
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**I. *Trout Unlimited v. DNRC*, 2006 MT \_\_\_, 331 Mont. 483, 33 P.3d 224**

**A. Background**

- Case arose out of applications for ground water permits in the area of the Smith River.
- Within the Upper Missouri River Basin closure, Mont. Code Ann. § 85-2-343, passed in 1993.
- Upper Missouri River Basin closure allowed the Department to process and grant water right permit applications under certain exceptions including stock, domestic, non-consumptive, municipal purposes and ground water that was not “immediately or directly connected to surface water.”
  - Mont. Code Ann. §85-2-342(2)(2005) defined “ground water” to mean, “water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.”
  - The definition of “ground water” was part of the original basin closure passed in 1993.
  - Legislature did not define what “immediately or directly connected to surface water” meant.
- The Department interpreted “immediately or directed connected to surface water,” to mean ground water that was pulling surface water into the “cone-of-depression.” If the cone-of-depression created by pumping a well at the flow and volume requested caused surface water to be drawn into the well, then the application could not be processed, i.e. accepted in the first place.
- If the Department accepted a ground water application, an objector to the application could disagree with the Department’s decision and raise the issue at a hearing under Mont. Code Ann. §85-2-309.
- In July of 2003, Trout Unlimited, irrigators, and outfitters filed a lawsuit against the Department claiming in part that the manner in which the Department made the determination that an application could be accepted was improper and that the Department’s definition of “immediate or direct” connection was too narrow. The Department and Trout Unlimited came to an agreement on how to determine if a ground water application could be accepted. The stipulation required that a Department hydrologist determine if an applicant had submitted sufficient data to determine if the cone-of-

depression would or would not intercept surface water. The issue of the meaning of “immediate or direct” connection remained.

- District Court held that Trout Unlimited had failed to exhaust its administrative remedies before bringing an action in District Court. The District Court further concluded that the definitions and methods involved in processing water use applications lie within the Department’s discretion and deferred to the Department’s administration of the statutory provisions contained in Mon. Code Ann. §§85-2-342 and -343.

#### B. Holding of TU

- The Montana Supreme Court determined that the Department’s interpretation of “immediately or directly connected” failed to account for impacts to surface flow caused by the prestream capture of tributary groundwater. The Court stated that the Department’s interpretation recognized only immediate connections to surface flow caused by induced infiltration and ignored the less immediate, but no less direct, impact of the prestream capture of tributary groundwater.
- Basin closures of Teton River Basin, and the Jefferson/Madison Basins had the same wording as the Upper Missouri River Basin closure. The language of the Bitterroot and the Upper Clark Fork Basin closures was not the same as that in the Upper Missouri River Basin closure. Mont. Code Ann. §§85-2-330 (Teton), -336 (Clark Fork), -341 (Jefferson/Madison), and -343 (Upper Missouri), -344 (Bitterroot). The Upper Clark Fork Basin and Bitterroot Basin closures did not define ground water.

#### C. Practical Result of TU

- Virtual *de facto* closure of the Upper Missouri River Basin, Teton River Basin, and the Jefferson/Madison Basins to new ground water permits under the exception. It was very difficult to prove that a ground water well did not result in prestream capture of water on its way to a surface source. (Applicant had to provide information that proved that the ground water they sought to use did not at any time capture prestream tributary ground water.)
- Approximately 28 applications were affected by TU and of those applications 21 were terminated.
- Because the wording of the closures in the Bitterroot and the Upper Clark Fork Basin closures was different, the Department did not apply TU to those basin closures.

- Affect of TU holding on prestream capture on the analysis of “adverse effect” under Mont. Code Ann. §85-2-311.

II. **House Bill 831 (2007 Legislature)** – generally, Mont. Code Ann. §§85-2-360 through 364.

- Passed in response to TU.
- Removed the “process” in “process or grant” language of the basin closure statutes.
- Removed the definition of “ground water” in the basin closure statutes, and thus, the issue of “immediately or directly connected.” Mont. Code Ann. §§85-2-329 (Teton), -340 (Jefferson/Madison), and -342 (Upper Missouri).
- Requires a “hydrogeologic assessment” for all ground water permit applications in closed basins. Mont. Code Ann. §85-2-360.
  - List of very specific requirements for the “hydrogeologic assessment.” Mont. Code Ann. §85-2-361. These analyses are site specific.
  - Purpose of the hydrogeologic assessment is to determine whether there will be “net depletion” to surface water sources.
  - Department adopted rules regarding net depletion. A.R.M. 36.12.102 AND 36.12.120, and there is information on the Department Water Rights Bureau website, [http://dnrc.mt.gov/wrd/water\\_rts/](http://dnrc.mt.gov/wrd/water_rts/).
- If the hydrogeologic assessment predicts that there will be a net depletion, the applicant must analyze whether the net depletion will cause an “adverse effect” on a prior appropriator.
  - Adverse effect is determination based, among other things, on the amount, location, and duration of the amount of net depletion. Mont. Code Ann. §85-2-360(5).
  - Applicant has an affirmative burden to prove lack of adverse effect to senior water appropriators under Mont. Code Ann. §85-2-311.
- If an applicant predicts in its hydrogeologic assessment a net depletion, the applicant shall offset the net depletion causing adverse effect through a mitigation plan or aquifer recharge plan. Mont. Code Ann. §85-2-362.
  - Mont. Code Ann. §85-2-362 has specific requirements for a mitigation plan and aquifer recharge plan.
  - Requires offset of only that amount of water necessary to prevent adverse effect.
- All of the related applications for permits (Mont. Code Ann. §85-2-311) and changes in appropriation (Mont. Code Ann. §85-2-402) must be submitted together under Mont. Code Ann. §85-2-363.

- Removed closed basin exceptions for “municipal use” and “municipal water supply” and replaced with an exception for “municipalities.” Mont. Code Ann. §§85-2-330, -341, -343, and -344.

### **III. *In the Matter of Application for Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company (December 2006)***

#### ***A. Background***

- Applicant Thompson River Lumber Company, Inc. (TRL) sought to appropriate 250 gallons per minute (gpm) (approx. 56 cfs) up to 400 acre-feet of water per year from the Clark Fork River. The proposed means of diversion was a pump. The proposed use was power generation. The proposed period of diversion and period of use is January 1 through December 31, inclusive.
- There were multiple objections to the Application.
- A contested case hearing under the Montana Administrative Procedure Act (Mont. Code Ann. Title 2 Chapter 4 Part 6) was held to determine whether TRL proved all of the criteria under Mont. Code Ann. §85-2-311, which includes, physical availability, legal availability, lack of adverse effect to a senior appropriator, adequate means of diversion, beneficial use of the water, and possessory interest in the place of use. Avista Corporation was the only objector to appear at hearing.
- The Application was denied in a Proposal for Decision for failure to prove legal availability and lack of adverse effect to a senior appropriator. The Department heard oral argument and considered written exceptions by the Parties on the Proposal for Decision. The Department denied the Application by Final Order December 2006.

#### ***B. The Decision***

- TRL compared flow data to the DNRC water right records for the Clark Fork River for a distance of five miles downstream of the proposed point of diversion. The Hearing Examiner found that the largest water right in this river reach is Pacific Power & Light’s (PPL) for 23,420 cfs for power generation at its Thompson Falls facility. TRL’s project site is approximately five miles upstream of Thompson Falls and PPL’s facility. Other water rights in combination with PPL in this reach resulted in combined rights of 1,467.7 cfs up to 72,771 acre-feet.
- Objector Avista has water rights of 50,000 cfs for Noxon Rapids Dam, approximately 40 miles downstream of the TRL’s proposed project.

- TRL argued that water is available for appropriation at any time the flow in the Clark Fork River is more than 50,000 cfs or at any time Objector Avista's needs are less than 50,000 cfs.
- Objector Avista uses the flows of the Clark Fork River up to 50,000 cfs at the Noxon Rapids Dam to generate electricity and/or refill the reservoir behind the Noxon Rapids Dam to maintain elevation head. Objector Avista maintains records of flow through its turbine generators on a daily basis. There was no month during which flows, on average, exceed 50,000 cfs. From the same daily flow records Objector Avista compiled the number of days on average a year when flows of the Clark Fork River at the Noxon Rapids Dam exceed 50,000 cfs. – 16.1 (Avista) to 23.7 (TRL) days a year between April and July. (Variance resulted from use of differing periods of record.)
- TRL maintained that 250 gpm is not measurable at downstream diversions when compared to the total flow in the Clark Fork River and that it is futile to measure 250 gpm (.56 cfs) flowing in the River. TRL was willing to decrease diversions if a legitimate call on the source is made by a downstream senior appropriator.
- The Hearing Examiner found that Objector Avista has water rights for power generation, for reservoir storage and release for power generation and reregulation of the flows in the Clark Fork River, and to provide hydraulic head for power generation at its facility at Noxon Rapids Dam in the amount of 50,000 cfs. Water is spilled without use by Objector Avista at its Noxon Rapids generating facility only 16 to 24 days on the average each year. Objector Avista will be not be able to fully exercise its water rights when Clark Fork River flows are less than 50,000 cfs.
- The Hearing Examiner found that TRL had not proven water was legally available because an applicant must prove that at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator. TRL did not prove that no legitimate calls for water will be made on him by a senior appropriator in at least some years. TRL could expect calls for water for all but 16 to 24 days of each year.
- The Hearing Examiner found that TRL had failed to prove lack of adverse effect to a senior appropriator – Avista. Avista would not receive all water to which it is entitled at times the flows in the Clark Fork River do not exceed 50,000 cfs if the appropriation were granted. Flows exceed 50,000 cfs only 16-24 days per year. There was no evidence in this case that the 250 gpm that the Applicant seeks to appropriate would not reach the Noxon Rapids Dam.

C. Practical Result of Thompson Lumber

- The case is a strong precedent for adverse effect. The Department reviews applications on a case-by-case basis.
- Applicants need to address whether their proposed appropriation would result in depletion to Clark Fork River.
- Applicants may need to offset depletion to the Clark Fork with mitigation water.
- The Department is reviewing various options.

## Montana Code Annotated - 2007

<http://opi.mt.gov/MCASearch/Index.html>

**85-2-360. Ground water appropriation right in closed basins.** (1) An application for a ground water appropriation right in a basin closed pursuant to [85-2-330](#), [85-2-336](#), [85-2-341](#), [85-2-343](#), or [85-2-344](#) or administratively closed pursuant to [85-2-319](#) must be accompanied by a hydrogeologic assessment that has been conducted pursuant to [85-2-361](#) to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan as provided in [85-2-362](#), if necessary.

(2) If the hydrogeologic assessment conducted pursuant to [85-2-361](#) predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in [85-2-311](#).

(3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in [85-2-363](#).

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than \$1,000 for each day of the violation.

(4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a), the department may proceed to process the application pursuant to [85-2-363](#) if, in addition to other applicable criteria, the applicant complies with [85-2-362](#).

(5) For the purposes of [85-2-360](#) through [85-2-362](#), the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(6) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department.

**History:** En. Sec. 14, Ch. 391, L. 2007.

**85-2-361. Hydrogeologic assessment – definition – minimum requirements.** (1) (a) For the purposes of [85-2-360](#) through [85-2-362](#), “hydrogeologic assessment” means a report for the project for or through which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology, hydrogeologic environment, water quality with regard to

the provisions of [75-5-410](#) and [85-2-364](#), and predicted net depletion, if any, including the timing of any net depletion, for surface water within the area described in subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right and any predicted water quality changes that may result.

(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a minimum, to:

- (i) the actual amount diverted for like beneficial uses;
- (ii) any amounts that will likely be lost in conveyance, if any, and whether any lost amounts are lost to the system through evaporation or other means or whether those amounts are returned to the system through percolation or other means; and
- (iii) any return flows from the proposed use, including but not limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the requirements of [75-5-410](#) and [85-2-364](#).

(2) (a) A hydrogeologic assessment that will be used to predict net depletion of surface water resulting from a new appropriation right must include hydrogeologic data or a model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer that incorporates for the new appropriation:

- (i) the area or estimated area of ground water that will be affected, not to exceed the boundaries of the drainage subdivisions established by the office of water data coordination, United States geological survey, and used by the water court, unless the applicant chooses to expand the boundaries;
- (ii) the geology in the area identified in subsection (2)(a)(i), including stratigraphy and structure;
- (iii) the parameters of the aquifer system within the area identified in subsection (2)(a)(i) to include, at a minimum, estimates for:
  - (A) the lateral and vertical extent of the aquifer;
  - (B) whether the aquifer is confined or unconfined;
  - (C) the effective hydraulic conductivity of the aquifer;
  - (D) transmissivity and storage coefficient related to the aquifer; and
  - (E) the estimated flow direction or directions of ground water and the rate of movement;
- (iv) the locations of surface waters within the area described in subsection (2)(a)(i) that are subject to an appropriation right, including but not limited to springs, creeks, streams, or rivers that may or may not show a net depletion;
- (v) evidence of water availability; and
- (vi) the locations of all wells or other sources of ground water of record within the area identified in subsection (2)(a)(i).

(b) A hydrogeologic assessment must also include a water quality report that includes:

- (i) the location of existing documented hazards that could be affected or exacerbated by the appropriation right, such as areas of subsidence, along with a plan to mitigate any conditions or impacts;
- (ii) other water quality information necessary to comply with [75-5-410](#) and [85-2-364](#); and
- (iii) a description of any water treatment method that will be used at the time of any type of injection or introduction of water to the aquifer to ensure compliance with [75-5-410](#) and [85-2-364](#) and the water quality laws under Title 75, chapter 5.

(3) The hydrogeologic assessment must include an analysis of whether the information

required by subsection (2) predicts that there may be a net depletion of surface water in the area described in subsection (2)(a)(i) and the extent of the depletion, if any.

(4) The hydrogeologic assessment, the model if provided, the test well data, the monitoring well data, and other related information must be submitted to the department. The department shall submit this information to the bureau of mines and geology. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(5) An entity that has previously conducted some type of hydrogeologic assessment may submit the information from that assessment as the hydrogeologic assessment required by this section if the information meets the criteria and requirements of this section.

**History:** En. Sec. 15, Ch. 391, L. 2007.

**85-2-362. Aquifer recharge or mitigation plans in closed basins – minimum requirements.** (1) An applicant whose hydrogeologic assessment conducted pursuant to [85-2-361](#) predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

(2) A mitigation plan must include:

- (a) where and how the water in the plan will be put to beneficial use;
- (b) when and where, generally, water reallocated through exchange or substitution will be required;
- (c) the amount of water reallocated through exchange or substitution that is required;
- (d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;
- (e) evidence that an application for a change in appropriation right, if necessary, has been submitted;
- (f) evidence of water availability; and
- (g) evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

(3) An aquifer recharge plan must include:

- (a) evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to [75-5-410](#) and [85-2-364](#);
  - (b) where and how the water in the plan will be put to beneficial use;
  - (c) when and where, generally, water reallocated through exchange or substitution will be required;
  - (d) the amount of water reallocated through exchange or substitution that is required;
  - (e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated;
  - (f) evidence that an application for a change in appropriation right, if necessary, has been submitted;
  - (g) a description of the process by which water will be reintroduced to the aquifer;
  - (h) evidence of water availability; and
  - (i) evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.
- (4) The department may not require an applicant, through a mitigation plan or an aquifer

recharge plan, to provide more water than the quantity needed to offset the adverse effects on a prior appropriator caused by the net depletion.

(5) An appropriation right that relies on a mitigation plan or aquifer recharge plan to offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional permit that requires that the mitigation plan or aquifer recharge plan must be exercised when the appropriation right is exercised.

**History:** En. Sec. 16, Ch. 391, L. 2007.

**85-2-363. Process for combining decisions on ground water permit applications in closed basins.** (1) An applicant for a permit to appropriate ground water in a closed basin shall submit to the department a combined application consisting of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary.

(2) The department shall review the application to determine if it is correct and complete under the process and requirements of [85-2-302](#).

(3) (a) Once an application has been determined to be correct and complete, the department shall prepare a notice and publish it as provided under [85-2-307](#).

(b) If no valid objection to the application is filed and the applicant proves that the criteria of [85-2-311](#) or [85-2-402](#), if necessary, have been satisfied, the application must be granted or approved in a modified form or upon terms, conditions, or limitations specified by the department.

(c) If no valid objection to the application is filed and the applicant has not proved that the criteria of [85-2-311](#) or [85-2-402](#), if necessary, have been satisfied, the application must be denied.

(d) If a valid objection to the application is filed, the department shall proceed to process the application pursuant to [85-2-308](#) through [85-2-311](#). If the applicant satisfies the criteria of [85-2-311](#) or [85-2-402](#), if necessary, and proves by a preponderance of the evidence that net depletion, if any, will not adversely affect a prior appropriator based on the applicant's mitigation plan or aquifer recharge plan, the department shall issue the permit.

**History:** En. Sec. 17, Ch. 391, L. 2007.

**85-2-364. Department permit coordination -- requirements for aquifer recharge plans.** To ensure that the department and the department of environmental quality are coordinating their respective permitting activities:

(1) an applicant for a new appropriation right pursuant to [85-2-360](#) that involves aquifer recharge shall provide the department with a copy of a relevant discharge permit if necessary; and

(2) the department may not grant a new appropriation right pursuant to [85-2-360](#) that involves aquifer recharge until the discharge permit, if necessary, has been obtained and presented to the department.

## **MONTANA CODE ANNOTATED 2005**

**MCA 85-2-342** (Emphasis added).

MONTANA CODE ANNOTATED

TITLE 85. WATER USE

CHAPTER 2. SURFACE WATER AND GROUND WATER

PART 3. APPROPRIATIONS, PERMITS, AND CERTIFICATES OF WATER RIGHTS

### **85-2-342. Definitions**

Unless the context requires otherwise, in **85-2-343** and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and **that is not immediately or directly connected to surface water.**

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam.

History: En. Sec. 1, Ch. 385, L. 1993; amd. Sec. 16, Ch. 497, L. 1997.

**MCA 85-2-343** (Emphasis added).

MONTANA CODE ANNOTATED

TITLE 85. WATER USE

CHAPTER 2. SURFACE WATER AND GROUND WATER

PART 3. APPROPRIATIONS, PERMITS, AND CERTIFICATES OF WATER RIGHTS

### **85-2-343. Basin closure -- exceptions**

(1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may **not process or grant** an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have

been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for **a permit to appropriate ground water**;

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for domestic, municipal, or stock use;

(d) an application to store water during high spring flows;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113(3).

History: En. Sec. 2, Ch. 385, L. 1993; amd. Sec. 455, Ch. 418, L. 1995; amd. Sec. 1, Ch. 441, L. 1997.

## **DNRC NET DEPLETION ADMINISTRATIVE RULES**

### **36.12.101 DEFINITIONS**

(37) "Net depletion" for the purposes of 85-2-360, MCA, means the calculated volume, rate, timing, and location of reductions to surface water resulting from a proposed groundwater appropriation that is not offset by the corresponding accretions to surface water by water that is not consumed and subsequently returns to the surface water.

(49) "Potentially affected area" for the purposes of 85-2-361, MCA, means, as referred to in basin closure rules and in the context of a hydrogeologic assessment, the area or estimated area where groundwater will be affected by a proposed project. The identified area is not required to exceed the boundaries of the drainage subdivisions established by the Office of Water Data Coordination, United States Geological Survey, and used by the Water Court, unless the applicant chooses to expand the boundaries.

### **36.12.120 BASIN CLOSURE AREA EXCEPTIONS AND COMPLIANCE**

(5) An applicant must identify the potentially affected area and provide a map depicting that area.

(6) A net depletion analysis must be submitted with the water right application and must include but is not limited to analysis of the following factors within the potentially affected area:

(a) evidence addressing the hydraulic connection between the source aquifer and all surface water. Surface water means, in addition to ARM 36.12.101(64) and for the purposes of 85-2-360 through 85-2-362, MCA, includes but is not limited to irrigation canals and drains;

(b) evidence of propagation of drawdown from pumping a proposed well or other groundwater diversion and volume, rate, timing, and location of any resulting surface water effects;

(c) evidence of the comparison of the proposed flow rate and period of diversion to similar types of existing water uses;

(d) estimates of the monthly volume of water consumed by a proposed project through evaporation, evapotranspiration, and all other forms of consumption associated with the proposed project;

(e) an assessment of potential return flows to a source aquifer or surface water source and the volume, rate, timing, and location of return flows;-

(f) in addition to ARM 36.12.101 (56) and for the purposes of 85-2-361, MCA, return flows includes but is not limited to any treated wastewater if the treated wastewater will be used as part of an aquifer recharge plan;

(g) the volume, rate, timing, and locations of accretions to surface water that is not consumed and subsequently returns to surface water; and

(h) a water balance table must be included that describes the monthly and total annual water balance for the proposal.

(7) An applicant must provide a list and map of the points of diversion of surface water appropriation rights and groundwater rights on record with the department that are located within the potentially affected area.

(8) Information required by the hydrogeologic assessment may not be sufficient to meet applicable criteria under 85-2-311, MCA, including but not limited to adverse effect to a prior appropriator. The applicant for a beneficial water use permit pursuant to 85-2-311, MCA, is responsible for providing sufficient evidence to meet all applicable criteria.